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Attorneys for Petitioner, Sheryl L. Allen

BEFORE THE UTAH STATE BOARD OF EDUCATION

In the matter of implementing HB 174 apart from HB 148.	)	**REQUEST FOR AGENCY ACTION**

Petitioner, Sheryl L. Allen ("Petitioner" or "Allen"), an interested party, submits this "Request for Agency Action" under the Utah Administrative Procedures Act, Utah Code Annotated, Sections 63-46b-0.5, *et seq*. Petitioner requests that the Utah State Board of Education ("USBOE" or the "Board) enter an emergency order pursuant to Utah Code Annotated, Section 63-46b-20. This order would constitute a ruling (1) that H. B. 174 is invalid and cannot stand when considered apart from H. B. 148, (2) that it is impossible to implement H. B. 174 because there is no funding for this legislation, and

(3) that, in any event, H. B. 174 should not be implemented, as a matter of discretion, on prudential grounds.

Petitioner sets forth below (1) the factual background underlying this petition, (2) the jurisdictional and procedural bases for entry of an emergency order, and (3) the several grounds which support the requested relief.

I. FACTUAL BACKGROUND

On February 2, 2007, the House of Representatives of the Utah State Legislature passed H. B. 148 by a margin of one vote. H. B. 148 is a so-called "voucher" bill in furtherance of the privatization of public education in the State of Utah. H. B. 148 was built around several major premises. The legislation establishes a "scholarship" program which subsidizes tuition for eligible students at qualified schools. Private schools which may qualify to receive subsidies, in most if not all instances, will have religious affiliations. The combination of public subsidies and religious affiliations will raise constitutional issues under the Constitutions of Utah and the United States. In order to avoid complicating and potentially unconstitutional entanglements, therefore, the bill expressly proscribes interference by the USBOE in the internal affairs of these institutions. The Legislature realized, moreover, that the creation and funding of a parallel, competitive school system would have financial consequences for public education, and, therefore, provided for so-called "mitigation monies" as a palliative in this event.

After passage in the House, H. B. 148 went to the Senate. Senators wanted to propose amendments to the bill, but were dissuaded in this regard, since any amendment

would return the bill to the House where, given the earlier, one-vote margin, it might have failed on a re-vote for approval.

After H. B. 148 had cleared both legislative chambers, it was delivered to the Governor for execution. Under parliamentary protocols, any bill, after passage but prior to approval by the Governor, may be recalled to the Legislature for reconsideration. Fearing that this might occur in the case of H. B. 148, sponsors of the legislation encouraged the Governor to sign the bill immediately upon presentation, which he did February 12, 2007.

After H. B. 148 had been signed by the Governor, the House passed H. B. 174. H. B. 174 is titled "Education Voucher Amendments," and, under a heading styled “Other Special Clauses,” notes that, “This bill coordinates with H. B. 148, Education Vouchers, by providing substantively superseding amendments.”

H. B. 174 accomplished this process of amendment by re-enacting certain sections of H. B. 148 with the addition of amendatory language. Five of the 12 sections of H. B. 148 were re-enacted in H. B. 174, but, within those 5 sections, only 7 changes in wording actually were made. These included alterations which were clarifying -- as in the addition of “academic” as a modifier to “performance” in line 96 -- and substantive -- as in a mandate for criminal background checks on private school teachers in lines 104 to 105.

H. B. 174 does not re-enact 7 other sections of H. B. 148. Those 7 sections include H. B. 148’s statement of purpose, definitions, means of enforcement, the proscription on state interference with private schools, and the provisions for calculation and allocation of so-called “mitigation monies.”

Because H. B. 174 incompletely re-enacts H. B. 148, the references to codification in H. B. 174 likewise are staggered and uneven. Thus, H. B. 148 will be codified in Utah Code Annotated, Sections 53A-1a-801 through 811, with an uncodified provision, Section 12, which makes an appropriation of $100,000 to the USBOE for costs of administration of the scholarship program. But H. B. 174 re-enacts only Sections 53A-1a-804, 805, 806, 808, and 811, omitting any reference to Sections 53A-1a-801, 802, 803, 807, 809, and 810.

H. B. 174 added 2 new uncodified sections. The first provides for the appropriation of what was intended to be an additional $100,000 for administration of the voucher legislation by the USBOE for "fiscal year 2007-08." The second provides that, "If H. B. 174 and H. B. 148, Education Vouchers, both pass, it is the intent of the Legislature that the amendments to the sections in this bill supersede the amendments to the same numbered sections in H. B. 148 when the Office of Legislative Research and General Counsel prepares the Utah Code database for publication."

The floor debates on H. B. 174 make clear that this bill,1 consistent with the "Special Clause" referenced above, was to be "coordinated" with H. B. 148 and that it was intended to improve that legislation by amendment. Legislators who had opposed H. B. 148 acknowledged their willingness to approve H. B. 174 only because H. B. 148, at that juncture, was a *fait accompli,* and H. B. 174 made a bad situation at least a little bit better. Under these circumstances, H. B. 174 passed both chambers of the State

[1] The legislative debates on H. B. 174 may be accessed electronically through the website of the Utah State Legislature.

Legislature by a two-thirds super-majority. The governor signed H. B. 174 on March 6, 2007.

Section 6 of H. B. 148 requires an appropriation from the General Fund for scholarship monies, and Section 3 of H. B. 174 re-enacts this requirement. The Legislature, however, funded H. B. 148, but not H. B. 174, through S. B. 3. Item 135 of S. B. 3 appropriates $12,200,000 and references H. B. 148, but not H. B. 174. This exclusion of H. B. 174 from the appropriation provided in S. B. 3 is transparently deliberate, not only because of the presence of a reference to H. B. 148 (and the title of that bill, "*Education Vouchers"*) and the absence of any reference to H. B. 174 (or the title of that bill, "*Education Voucher Amendments"*), but also because only $100,000 for administration of the scholarship program as required in H. B. 148 (and not the additional $100,000 provided in H. B. 174) is earmarked in S. B. 3.

At the conclusion of the 2007 legislative session, an organization known as Utahns for Public Schools ("UPS") filed a petition with the Lieutenant Governor of the State of Utah, seeking a referendum on H. B. 148. This referendum petition, however, omitted any reference to H. B. 174. Presumably UPS did not believe that H. B. 174 had any validity apart from H. B. 148, but, in any event, Utah's Constitution, in Article VI, Section 1(2)(a)(i)(B), proscribes referenda on bills that are passed in both chambers of the State Legislature by a two-thirds super-majority. Hence, in the event that H. B. 174 has any validity, standing alone, it cannot be the subject of a referendum.

As the UPS drive for petitions gained momentum, proponents of the voucher legislation, *viz.,* Parents for Choice in Education, retained Parr Waddoups Brown Gee & Loveless, and arranged for that firm to deliver an opinion of counsel to Gary R. Herbert,

Utah's Lieutenant Governor. The gravamen of this opinion is that, even if there is a referendum on H. B. 148 and Utah voters disapprove that legislation, H. B. 174 has validity, independent of H. B. 148, and must be enforced accordingly. Following suit, Utah's Governor, Jon H. Huntsman, Jr., asked Mark L. Shurtleff, the Utah Attorney General, for an opinion which answered the same question. Mr. Shurtleff issued an opinion which essentially concurred with the views expressed by Parr Waddoups.

On April 30, 2007, the Utah Lieutenant Governor confirmed that sufficient signatures have been gathered so that a referendum on H. B. 148 will be held. Under these circumstances, Utah law, in effect, suspends the effective date for H. B. 148 until a vote democratically to approve or disapprove this legislation is held. On May 9, 2007, Governor Huntsman, by executive order, fixed the date of the referendum on H. B. 148 at November 6, 2007.

In the meantime, however, pressure to implement H. B. 174 apart from H. B. 148 had begun in earnest. At a meeting on May 3, 2007, the USBOE tabled a proposed rule for the implementation of H. B. 148 (in light of the stay on enforcement of H. B. 148 that resulted from the petition drive noted above) and began to address the formulation of a rule for implementation of H. B. 174. In furtherance of this effort, the USBOE sought guidance from the Attorney General on Board authority to draft a rule for H. B. 174 that feasibly could fill the interstices left in the absence of H. B. 148.

Since that time, the importunings to implement H. B. 174 apart from H. B. 148 have reached a crescendo. Parents for Choice has conducted a rally at the Utah State Capitol, demanding implementation of H. B. 174, notwithstanding the uncertainties

inherent in this course.2 Other parents have brought students to the Utah State Office of Education and plead for a decision on enforcement of H. B. 174. The Attorney General peremptorily has "ordered" the Board to implement H. B. 174, and has editorialized over the radio and in newspapers that the law is the law and must be obeyed.3 Parents for Choice reportedly have threatened litigation, in some form, which will generate more heat in connection with the issues surrounding H. B. 174.4

Aside from these concerns, parents, children, and private schools in fact need to know the status of this legislation, whether scholarship funds will be available, and, if so, when and on what terms and conditions, so that plans can be made for the school year which is just around the corner. They should not be left in a state of uncertainty indefinitely.

Likewise, many are fearful that the ambiguous status of H. B. 174, unless clarified, may cast a pall of confusion over the referendum on H. B. 148, preventing a fair election on the idea of vouchers in our public schools.5 Accordingly, by resolution at a May 3rd meeting, the Board asked the political branches of State government, the Governor and Legislature, to clarify the relationship between H. B. 148 and H. B. 174 by means of a special legislative session and in light of the impending referendum. Certain

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[2] "Hundreds rally for voucher law," *Deseret Morning News,* May 16, 2007.
[3] "Utah AG orders school board to implement voucher program," *The Salt Lake Tribune,* May 15, 2007. Mark Shurtleff, "The rule of law is not subject to whim or popularity," *The Salt Lake Tribune,* May 23, 2007.

[4] "Pro-voucher group to announce legal action," *The Salt Lake Tribune,* May 24, 2007.

[5] "Legal opinions cast cloud over referendum against vouchers," *Deseret Morning News,* March 27, 2007.

legislators have joined this call for a special session in the hope that this legislative effort might bear fruit. Please see Appendix A to this Request for Agency Action. And the Attorney General, as recently as last week, in apparent contravention of his original certitude on the merits of H. B. 174, re-stated a need for a legislative answer to this ongoing conundrum.6

It does not appear, however, that a special session will be called,7 and, in the absence of a solution from the political departments of state government, the Board is left to decide whether H. B. 174 may be implemented apart from H. B. 148. It is time for the Board to make that decision.

II. JURISDICTION AND PROCEDURE

The Utah Constitution, Article X, Section 3, provides, in pertinent part, that, "[t]he general control and supervision of the public education system shall be vested in a State Board of Education." Section 3 of Article X grew out of Section 11 of the Enabling Act, 28 Stat. 107 (July 16, 1894) which authorized the admission of Utah to Statehood and which, as relevant, requires that, "[t]he schools . . . provided for in this Act shall forever remain under the exclusive control of said State[.]" Subsequent decisions of the Utah Supreme Court make clear that the jurisdictional grant of "general control and supervision" found in Article X, Section 3, is "plenary" and all-encompassing. *See, e.g., Utah School Boards v. State Bd. of Educ.*, 17 P.3d 1125 (Utah 2001).

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[6] "Voucher clarification? Shurtleff, education officials to ask for special session," *Deseret Morning News*, May 19, 2007.

[7] "Voters' voucher decision will be honored, Huntsman says," *Deseret Morning News*, May 24, 2007.

The Board is an "agency" for purposes of the Utah Administrative Procedures Act. *See,* Utah Code Annotated, Section 63-46b-2(1)(b). And, thus, Board action which "determines . . . legal rights, duties, privileges, immunities, or other legal interests . . ." including action to "grant, deny, revoke, suspend, modify, annul, withdraw, or amend . . . [any] right. . ." is regulated by and subject to the procedures given in that statute. *See,* Utah Code Annotated, Section 63-46b-1(1)(a).

The Utah Administrative Procedures Act authorizes the Board, as an agency, to ignore all requirements of administrative procedure which otherwise might obtain and to enter an "order on an emergency basis[.]" *See,* Utah Code Annotated, Section 63-46b-20(1). The grounds for taking this action, set forth in the statute, are that the known facts show an "immediate" and "significant" danger to the "public . . . welfare," and that this danger "requires immediate action by the agency." *See,* Utah Code Annotated, Section 63-46b-20(1)(a) and (b).

We submit that these grounds presently exist. The public welfare surely includes the educational needs of parents for their children. That welfare is jeopardized by the confusion over the relationship between H. B. 148 and H. B. 174 and the political gridlock, noted above, which has failed to bring clarity to this situation. This jeopardy is "significant" and "immediate," not only because the rights of parents and children to a particular form of educational opportunity has inherent importance (and never would be gainsaid by this Board), but also because, if H. B. 174 is implemented, 12,300,000 dollars of taxpayers' money (as projected by legislative fiscal analysts) will be put at risk. The Board, in effect, will be "gambling" that, once disbursed, these funds will not have to be recalled in the event that H. B. 174 later is determined, through judicial decisions or

otherwise, to be invalid apart from H. B. 148. This recall, moreover, may be expected to work a "significant" hardship upon initial recipients of scholarship monies. The overall cost of this "wager," in other words, is a "material" fact which cannot be ignored by the Board under the circumstances of this case.

The public welfare also includes respect for the law, and implementation of H. B. 174 "significantly" and "immediately" endangers the "rule of law" in at least 3 respects. First, although the Attorney General recently has admonished the Board to "obey the law," he has assumed erroneously that H. B. 174 is "the law." As demonstrated below, H. B. 174, standing alone, is *not* the law, and, implementation of this bill, apart from H. B. 148, therefore, would violate the Legislature's clearly expressed intent. What is more, the "law" says that the Board cannot disburse funds which have not been appropriated by the Legislature. At present, there are no appropriated funds for the scholarship program. If the Board believes in "obedience to law," then it will respect the state budgetary process. If the Board wants to be an "outlaw," on the other hand, it will write checks for 12,300,000 dollars when there is no legislative authorization for this distribution of funds.

Second, whatever the merits of H. B. 174 when divorced from H. B. 148, Board members have taken an oath to abide by a higher law, namely, the Utah Constitution, in discharging their administrative duties. Even the Attorney General acknowledges that H. B. 174 (when divorced from H. B. 148) has increased vulnerability to a constitutional challenge. This is because the Utah Constitution contains no fewer than 6 prohibitions on the intermingling of state educational policies with private religious activities.[8] H. B.

[8] Utah Constitution, Article X, Section 1, requires the public education system, insofar as elementary and secondary schools are concerned, to be "open" and "free." An "open" and "free"

174, if implemented apart from H. B. 148, will require the Board to enter this constitutional danger zone, which in turn poses a material risk of unconstitutional, and, thus, unlawful behavior.

Another constitutional principle, the separation of powers, also is at stake in this controversy. Respect for that principle of constitutional law, as shown below, requires the board to implement H. B. 174 independently of H. B. 148 only if the Legislature, a coordinate branch of state government, intended this result. And even if the intent of the Legislature is unclear on this point, respect for the constitutional doctrine of separate powers requires the Board to give priority to the legislative department in clarifying this matter.

Third and finally, the right to vote is a fundamental right, the very right which undergirds the "rule of law." So long as the relationship between H. B. 148 and H. B. 174 remains uncertain, this right -- to exercise the franchise in a meaningful way -- is

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education, pursuant to this constitutional language, has been interpreted to mean education untainted by religious preferences or ecclesiastical discrimination. *See, e.g., Logan City School Dist. v. Kowallis,* 77 P.2d 348 (Utah 1938). Utah Constitution, Article X, Section 1, requires that any education system established or maintained "shall be free from sectarian control." Utah Constitution, Article X, Section 8, provides that, "No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in the state's education systems." Utah Constitution, Article X, Section 9, provides that, "Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or education institution controlled by any religious organization." Utah Constitution, Article III, fourth part, provides that, "The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control." Utah Constitution, Article I, Section 4, provides that, "The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof[ ] . . . There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

compromised. As the recent pronouncement from Utah's governor makes clear,9 this is a recognized reality among Utahns everywhere, even though the legislative leadership does not have the "political will" to guarantee a meaningful vote via remedial steps in a special session. The responsibility for vindication of the right to vote with meaningful results, therefore, has devolved by default upon the Board and the courts. The Board can expedite a final resolution of this question by entering an emergency order for the reasons and on the grounds articulated below.

III. ARGUMENTS AGAINST TREATING H. B. 174 AS A STAND-ALONE MEASURE

[9] "Voters' voucher decision will be honored, Huntsman says," *Deseret Morning News*, May 24, 2007.

H. B. 174 is not a stand-alone measure and cannot be implemented by the Board for the reasons elaborated below. A. The Utah Legislature never intended that H. B. 174 would be implemented independently of H. B. 148. The Board may ascertain that intent through garden-variety rules of statutory construction. B. The same result follows if we assume that H. B. 148 will be disapproved by voters in a referendum. In that event, related rules of statutory construction tell us that H. B. 174 will fall with H. B. 148, and, hence, one cannot be implemented without the other. C. Even if H. B. 174 does not fall automatically if H. B. 148 is disapproved at the polls, a so-called "severability" analysis confirms that this will be the outcome in any event. D. H. B. 174 cannot be implemented because the Legislature did not appropriate any funds in this regard. E. The Board should rule against H. B. 174 for prudential reasons. The Board should not gamble with taxpayer monies on the outcome of the debate over the validity of H. B. 174 apart from H. B. 148. The Board members, as fiduciaries, should not speculate with public funds. The Board should take the high road of constitutional principle, and under separation of powers doctrine, give priority to the lawmaking department of state government to clean their own house (insofar as it may not be clear that H. B. 174 cannot exist independently and apart from H. B. 148).

A. The Board Should Adhere to the Legislature's Intent as Determined Through Ordinary Rules of Statutory Construction; The Legislature Did Not Intend for H. B. 174 to Be Implemented Independently from H. B. 148

All agree that a determination whether H. B. 174 may be implemented independently of H. B. 148 will turn, in the first instance, on an analysis of what the House and the Senate "intended" when they enacted both of these provisions in the 2007 legislative session.

But how can we know what a legislative body "intends" or "means" when it passes bills such as H. B. 148 and H. B. 174? A poll of every member in each house (29 Senators and 75 Representatives), would be impracticable, and at best unhelpful or at worst unreliable, since different members have varying reasons for voting yea or nay on a specific bill, and these reasons, even if firm on occasion, may become inconstant in partisan weather. Because of these political realities, courts generally do not look to the views of individual legislators when searching for a principled construction of a particular statute. *See, e.g.,Wood v. University of Utah Medical Center,* 67 P.3d 436, 444-445 (Utah 2002). *See also, Pannell v. Thompson,* 589 P.2d 1235, 1239-1240 (Wash. 1979) (*en banc*); *Murphy v. Nilsen*, 527 P.2d 736, 738 (Ore. Ct. App. 1974).

Since a few legislators do not reflect the views of an entire assembly, and, therefore, cannot speak for that body, courts employ what are known as "canons" or "rules" of statutory construction in order to ascertain the legislative "intent" behind a particular enactment. In Utah, as we shall see below, certain of these "canons" or "rules" are codified in statutes, but in all events they are well-known tools which are regularly employed by the judicial branch to decipher the mysteries of legislation.

Under these rules of construction, a bill's meaning, in the first instance, is ascertained by what plainly is indicated or obviously inferred from the relevant text. Indeed, if the words of the statutes are straightforward and unambiguous, there is no need

to go further in a search for meaning. *See, e.g., J. Pochynok Co., Inc. v. Smedsrud,* 116 P.3d 333, 357 (Utah 2005).

Applying this primary rule of statutory construction, it is clear beyond cavil that H. B. 148 and H. B. 174 cannot operate independently of each other. The language of this legislation, in no fewer than 5 ways, expressly indicates that the two bills are to be enforced together, if at all, rather than torn asunder.

1. H. B. 174 is an "amendment" of H. B. 148. H. B. 174 is styled as an "amendment" to H. B. 148. It is a limb grafted to a tree and, therefore, has no life all alone. This textual connection denotes that the two statutes are parts of a whole and may not be considered apart from each other.

Realizing that this status as "amendment" signifies that H. B. 148 merely is an appendage of and incomplete without H. B. 148, the opinions from the Attorney General and Parr Waddoups strain to undercut this textual signpost.

The Attorney General's opinion, for example, asserts that use of the term "amendment" occurs in the title of H. B. 174, and "the title is not controlling." But this assertion is incomplete and therefore misleading.

The term "amendment" or synonyms for that term occur, not only in the title of H. B. 174, but also in a section heading and as text in separate sections of the bill. This terminology permeates H. B. 174, appearing and re-appearing no less than 9 times in the legislation. With this many bread crumbs strewn upon the trail, we think it a fair inference that our Legislature believed that it was "amending" H. B. 148 when it passed H. B. 174.

What is more, the Attorney General's opinion omits to disclose that, even if the term "amendment" were referenced solely in the title rather than the body of H. B. 174, that reference, where appropriate, may be used by courts as an interpretive tool in understanding legislative intent. *See, e.g., Jenkins v. Percival,* 962 P.2d 796, 800 (Utah 1998). Hence, if the Attorney General's opinion is implying that the term "amendment" in the title of H. B. 174 could have no bearing on the meaning of that bill, this implication is wrong.10

Finally, contrary to the Attorney General's opinion, the manner in which H. B. 174 is titled may have controlling significance insofar as the validity of that bill is concerned. This is because Article VI, Section 22, of the Utah Constitution provides, in pertinent part, that "Except general appropriation bills and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, *which shall be clearly expressed in its title."* (Emphasis supplied.)

The case law is unanimous in emphasizing that the titles of bills should be construed, wherever possible, in order to uphold legislation which is challenged under Article VI, Section 22. *See, e.g., McGuire v. U. of Utah Medical Center,* 603 P.2d 786, 798 (Utah 1979) ("'If, therefore, by any reasonable construction, the title of the act can be made to conform to the constitutional requirement, it is the duty of the courts to adopt

[10] By statutory command, in Utah Code Annotated, Section 68-3-13, bill sections may be summarized and named in boldface as bills are introduced in the Legislature. Any such boldfaced heading, however, "is not law; it is intended only to highlight the content of each section, part, chapter, or title for legislators. Inaccurate boldface is not a basis for invalidating legislation. The Office of Legislative Research and General Counsel is authorized in Section 36-12-12 to change the boldface in the enrolling process so that it more accurately reflects the substance of each section, part, chapter, or title." The description of H. B. 174 as an "amendment" was not changed by the Office of Legislative Research and General Counsel when that bill was enrolled.

this construction rather than another . . . '" quoting *Edler v. Edwards,* 95 P. 367, 368 (Utah 1908)).

Put inversely, legislation should be invalidated on account of a defective title only when necessary to serve the purpose contemplated by Article VI, Section 22. That purpose, boiled to essentials, is to supply fair notice of the content and purport of bills so that they do not achieve enactment through mistake, manipulation, chicanery, or fraud. *See, e.g., Utah State Fair Ass'n v. Green,* 249 P. 1016, 1024 (Utah 1926).11

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[11] For example, the court in *Utah State Fair Ass'n* quotes a treatise on state constitutional law which observes that: "'The practice of bringing together into one bill subjects diverse in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the Legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the Constitution meant to put an end to legislation of the vicious character referred to, which was a little less than a fraud upon the public and to require that in every case the proposed measure should stand upon its own merits, and that the Legislature should be fairly satisfied of its design when required to pass upon it.'" *Utah State Fair Ass'n v. Green,* 249 P. at 1024 (citation omitted).

In *Pass v. Kanell,* 100 P.2d 972, 978 (Utah 1940), Justice McDonough, in dissent and also quoting a treatise on the subject, describes the purpose of Article VI, Section 22, in similar terms: "'The mischief sought to be remedied by the requirement of a single subject or object of legislation was the practice of bringing together in one bill matters having no necessary or proper connection with each other but often entirely unrelated and even incongruous. By the practice of incorporating in proposed legislation of a meritorious character provisions not deserving of general favor but which, standing alone and on their own merits, were likely to be rejected, measures which could not have been carried without such a device and which were sometimes of a pernicious character were often incorporated in the laws; for, to secure needed and desirable legislation, members of the legislature were, by this means, often induced to sanction and actually vote for provisions which, if presented as independent subjects of legislation, would not have received their support. It was also the practice to include in the same bill wholly unrelated provisions, with the view of combining in favor of the bill the supporters of each, and thus securing the passage of several measures, no one of which could succeed on its own merits. To do away with this hodge podge or 'log rolling' legislation was one, and perhaps the primary,

We do not believe that the title to H. B. 174, if given a natural reading, is violative of Article VI, Section 22. The title of H. B. 174 fairly notifies all legislators and the general public that this is an "amendment" to the voucher legislation that was passed as H. B. 148. But if we are to read H. B. 174, not as an amendment to H. B. 148, but instead as repealing that statute and enacting a replacement, as suggested in the opinions of the Attorney General and Parr Waddoups, the constitutionality of H. B. 174 would become questionable in view of Article VI, Section 22. This is because the title of H. B. 174 does not fairly notify legislators that they are voting for repeal and substitution and, indeed, by using the word "amendment," would be positively misleading in this regard.12 The only way to remove this question-mark respecting the constitutionality of H. B. 174 under Article VI, Section 22, is to follow the injunction of *McGuire, Edler,* and similar

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object of these constitutional provisions. Another abuse that developed in legislative bodies was the practice of enacting laws under false and misleading titles, thereby concealing from the members of the legislature, and from the people, the true nature of the laws so enacted. It is to prevent surreptitious legislation in this manner that the subject or object of a law is required to be stated in the title. While the objects of these constitutional provisions are variously stated, the authorities are agreed that they were adopted to remedy these and similar abuses. The purposes of these constitutional provisions have been summarized as follows: (1) to prevent 'log rolling' legislation; (2) to prevent surprise, or fraud, in the legislature by means of provisions in bills of which the titles give no intimation, and (3) to apprise the people of the subject of legislation under consideration.'" (Citation omitted.)

And Justice Latimer, writing in *Thomas v. Daughters of Utah Pioneers,* 197 P.2d 477, 508 (Utah 1948) echoes these views: "The general rule has been announced that the title [of a bill] is sufficient if it is not productive of surprise and fraud and is not calculated to mislead the legislature or the people, but is of such character as fairly to apprise the legislators and the public of the subject matter of the legislation and to put anyone having an interest in the subject on inquiry."

[12] At one point, *The Salt Lake Tribune* gave voice to this concern in an editorial which accused leading legislators of attempting to hornswaggle the House through passage of H. B. 174. "People Power: Is voucher law result of sleight of hand?" *The Salt Lake Tribune,* March 31, 2007.

authorities and to construe H. B. 174, not as a repeal and replacement but as an amendment of H. B. 148. When so construed, the two bills must be viewed together as original and amendatory statutes, and not separately as one bill revoking and displacing the other.

2. H. B. 174 must be "coordinated" with H. B. 148. The denomination of H. B. 174 as an "amendment," without more, shows that the two bills must work in tandem. But H. B. 174 reinforces the obvious by stating, in a "special clause," that, "This bill," H. B. 174, "coordinates with H. B. 148[.]"13 To coordinate, as defined in our dictionary, means "of or marked by coordination: marked by related actions or processes cooperating . . . to bring into a common action, movement, or condition: regulate and combine in harmonious action: harmonize." By using this language respecting coordination, the legislature demonstrated an intention to have the bills implemented together and not independently of each other.

But the Attorney General and Parr Waddoups, in their opinions, do not want to take the Legislature at its word (the word being "coordinate"); they believe that H. B. 174 repealed and replaced H. B. 148, and that, therefore, H. B. 174, consistent with this belief, now must be implemented alone. The "repealed and replaced" argument, however, cannot be taken seriously.

[13] The term "coordinates" must be given force (even outside a "special clause"), because, when writing a statute, the legislature is deemed to have used each word advisedly. *See, e.g., Jackson v. Mateus,* 70 P.3d 78, 85 (Utah 2003).

H. B. 174 does not repeal H. B. 148 by any *express* language. The Attorney General and Parr Waddoups, therefore, must mean that H. B. 174, as the latest enactment, repealed H. B. 148 *by implication.*

But repeals by implication are not favored under Utah law. *See, e.g., Board of Educ. v. Sandy City Corp.*, 94 P.3d 234, 239 (Utah 2004). There can be no repeal by implication in the absence of an "unavoidabl[e] conflict" between the prior and subsequent enactments. *Id.* And even in the presence of such conflict, a court has an "obligation to harmonize" statutes wherever possible. *Id.* These rules have special force where the two bills allegedly at odds both are passed in the same legislative session. *See, State v. Shondel*, 435 P.2d 146, 147 (Utah 1969) (where statute and amended statute are passed within days in same session of Utah Legislature, general rule that last act takes precedence does not apply; court endeavors to reconcile measures through canons of construction). *See also, State v. Chapman*, 998 P.2d 282, 290 (Wash. 2000) (rule respecting harmonization of statutes applies with "particular force" to statutes passed in same legislative session); *Salahub v. Montgomery Ward & Company,* 599 P.2d 1210, 1215-1216 (Ore. Ct. App. 1979) (where statutes passed during same session, courts must construe their provisions together so that they remain intact unless there is irreconcilable conflict).

The opinions of the Attorney General and Parr Waddoups do not cite or discuss the law respecting repeals by implication. Nor do they tell us where or how H. B. 148 and H. B. 174, by their terms, are inexorably in conflict, or why that conflict, if it exists, cannot be resolved through interpretation.

This failure on the part of the Attorney General and Parr Waddoups to treat the most elementary law respecting statutory repeal and the application of that law to the relationship between H. B. 148 and H. B. 174 is painfully conspicuous. As noted above, the single precedent from this jurisdiction on bills passed in the same session is contrary to their position. More important, there is no conflict between H. B. 148 and H. B. 174. H. B. 174 merely "amends" H. B. 148. *H. B. 174 states that the two bills are to be "coordinated," a task, we submit, that would be difficult of achievement in the event that H. B. 148 truly were repealed by H. B. 174.* And as discussed in more detail below, Section 7 of H. B. 174 has specific language on how that coordination will be achieved by codification *in the event that both bills pass together*.

In short, unless H. B. 148 and H. B. 174 have textual disagreements which are impossible to reconcile through interpretation, there can be no repeal by implication as that doctrine has been applied by the Utah Supreme Court.14

Perhaps sensing (without discussing) that their "repeal by implication" argument will not wash under the cases or facts of this case, the Attorney General and Parr Waddoups seize upon the enactment clauses in H. B. 174 ("Be it enacted by the Legislature of the state of Utah"), stressing that, in view of this language, H. B. 148 is a separate enactment in its own right and has legal existence and becomes administratively enforceable apart from H. B. 148. Like a wizard perseverating over a spell, the language

[14] The Parr Waddoups opinion appears to depend entirely upon the argument that H. B. 174 repealed H. B. 148. The Attorney General's opinion is internally inconsistent in this regard, waffling between an argument for repeal and a severability analysis which is unnecessary in the event, and, therefore, by negative inference, undercuts the argument for repeal.

of "enactment," "superseding enactment," "superseding substantive enactment," pervades the opinions of the Attorney General and Parr Waddoups.

But these gentlemen overstate their case. To begin, let's start with what H. B. 174 says rather than what some might wish that it said. H. B. 174 was "enacted," but the text of the bill, contrary to what may be implied by the Attorney General, never says "superseding enactment" or "superseding substantive enactment." H. B. 174 provides that it will become a "superseding substantive *amendment*" in the event that both H. B. 148 and H. B. 174 pass together. Hence, H. B. 174's effectiveness is conditioned upon joint passage with H. B. 148, and, although H. B. 174 is a new branch to the tree of H. B. 148, it still is a branch which has no sustainable life apart from that tree.

And what does it mean, after all, when a bill carries words of "enactment?" *Every bill* which is proposed as legislation in the state of Utah -- whether original or amendatory -- as a matter of statutory edict -- must be prefaced with "Be it enacted" language. *See,* Utah Code Annotated, Section 36-10-1.15 Enacting clause requirements such as Section 36-10-1, in most if not all jurisdictions, are throwbacks to the 19th Century when lawmakers were less sure about the status and force of statutes in relation to the common law. *See generally,* W. D. Popkin, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION, 61 and 271 n.9 (1999).

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[15] Perhaps for historical reasons, in Utah, this never has been a constitutional requirement as in many other states. *Cf. Watson v. Corey,* 21 P. 1089 (1889). *Compare, e.g., State v. Kearns,* 623 P.2d 507, 509 (Kan. 1981); *Caine v. Robbins,* 131 P.2d 516, 518 (Nev. 1942); *People v. Washington,* 969 P.2d 788, 789-788 (Colo. Ct. App. 1998). *See generally,* 1A N. J. Singer, STATUTES AND STATUTORY CONSTRUCTION, Section 20:6 (6th ed. rev. 2002).

The enacting clauses in H. B. 174, on their face, are a matter of form, not substance; they say nothing more than "Be it enacted," a phrase that does not express or imply any meaning in relation to H. B. 148; they do not indicate how we should construe H. B. 174 in relation to H. B. 148, another piece of legislation bearing the same preface of enactment. Hence, although the Attorney General and Parr Waddoups attempt to make magic through the incantation of "enactment," in the end, it is nothing more than sound which signifies nothing.

Even if the meaning which is desired by the Attorney General and Parr Waddoups, that H. B. 174 is a new creation, separate and apart from H. B. 148, could be inferred from the enactment clauses of H. B. 174, this inference would be overruled by statute in the State of Utah. Utah Code Annotated, Section 68-3-6, a rule of construction which has been legislatively decreed in our jurisdiction, provides that, "The provisions of any statute, so far as they are the same as those of any prior statute, *shall be construed as a continuation of such provisions, and not as a new enactment."* (Emphasis supplied.)

Finally, we return to the law of repeal by implication. The argument from "enactment," after all, is merely a backdoor argument that H. B. 174, by separate enactment, repealed and replaced H. B. 148. But the enacting clauses in H. B. 174 neither address nor contravene the established law on repeal by implication, discussed above, and therefore are no help in establishing the independence of H. B. 174 in relation to H. B. 148.

And if H. B. 174, by separate "enactment," truly repealed and replaced H. B. 148, all parties in interest who have been concerned, since the end of February, with implementation of the voucher legislation were strangely oblivious to this fact until

enlightened by the opinions of the Attorney General and Parr Waddoups. After the Legislature adjourned, the Board, in March, circulated a draft rule for implementation of H. B. 148 as amended by H. B. 174. That rule had a second reading at the April meeting of the Board. Legislative sponsors of the voucher bills have been apprised of this rulemaking effort. Voucher proponents have attended these meetings of the Board. But nobody has complained that the Board was implementing the wrong legislation, that it should be implementing only H. B. 174, the statute which "repealed and replaced" H. B. 148.

The "repeal and replace" argument was contrived, after the fact, in order to complicate the referendum efforts of UPS. But for the petition drive, the argument never would have seen the light of day. This "post hoc" rationalization of events surely should not pass for "legislative intent," if we sincerely are striving to understand the relationship between these two bills. We infer from the absence of objections and the lack of head-scratching while the Board was *coordinating* H. B. 148 and H. B. 174 by a proposed rule in March and April that all believed that H. B. 174 was merely amendatory of H. B. 148 and that both bills were seen as one piece of unified legislation. *See, e.g., Cannon v. Gardner*, 611 P.2d 1207, 1208-1209 (Utah 1980) (if there is a question respecting interpretation of statute or priority of one statute over another, it is appropriate for court to look at circumstances of origin, purpose, acceptance, and practice respecting those provisions).

3. The operation of H. B. 174 was conditioned upon joint passage with H. B. 148. As if fearing that a large law firm or prominent attorney general might mistake the meaning of “amendment” or “coordinate,” our Legislature did not stop with these verbal

clues. H. B. 174 added an entirely new and separate section, Section 7, for "coordinating H. B. 174 with H. B. 148." Section 7 provides that, "If this H. B. 174 and H. B. 148, Education Vouchers, both pass, it is the intent of the Legislature that the amendments to the sections in this bill supersede the amendments to the same numbered sections in H. B. 148 when the Office of Legislative Research and General Counsel prepares the Utah Code database for publication."

Here again the Legislature expressly contemplates the "coordinating" of H. B. 174 and H. B. 148, and, to underline the point, makes this coordination conditional upon joint passage of H. B. 174 with H. B. 148 ("If this H. B. 174 and H. B. 148 . . . both pass").16

Indeed, it may not be unnatural to read this conditional clause, "If . . . both pass," to embrace the contingency of a referendum, since, in substance, H. B. 148 has neither passed nor become effective as legislation, and, as matters now stand, this cannot occur until approval is obtained by a popular vote. Absent fulfillment of this "condition," H. B. 174 has nowhere to go – or has nothing to "supersede" – or has no partner legislation with which it may be "coordinated."

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[16] Read literally, Section 7 of H. B. 174 means that H. B. 174 in its entirety has either no force or a deferred effect. The former is true because the "amendments" which are H. B. 174 "supersede" only the "*amendments* to the same numbered sections in H. B. 148[.]" (Emphasis supplied.) As we have seen from the factual background recited above, however, the sponsors of H. B. 148, for parliamentary reasons, deliberately avoided amendments to that bill, fearing that such alterations would be the occasion for a recall of that statute. In other words, since H. B. 174, by its terms, supersedes only amendments to H. B. 148, and since there were no amendments to H. B. 148 in fact, H. B. 174 has nothing upon which to act and perforce becomes inactive and ineffective. The latter may be true because the "amendments" which are H. B. 174 are timed to supercede the "amendments" in H. B. 148 "when the Office of Legislative Research and General Counsel prepares the Utah Code database for publication[,]" an event which will not occur for some time.

Section 7 has still another textual indication that H. B. 174 is inseparable from H. B. 148. Section 7 of H. B. 174 provides that "it is the intent of the Legislature" to substitute the numbered [*i.e.,* codified] sections of H. B. 174 with the "same numbered sections" of H. B. 148 when the statute is placed in the official database for the Utah Code. This language obviously contemplates a complete merger of the two bills, since otherwise the resulting codification, as noted above, would be incomplete, irregular, and uneven.

4. H. B. 174 is unworkable unless read together with H. B. 148. In Utah, "'statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd.'" *J. Pochynok Co., Inc. v. Smedsrud*, 116 P.3d at 357, quoting from *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980). Moving past the textual signposts noted above, H. B. 174 would be incomprehensible if viewed in isolation from H. B. 148. A statement of purpose and definition of terms is written into H. B. 148, but omitted from H. B. 174. Absent these features, the Board must invent a purpose or manufacture definitions in order to inform the implementation of H. B. 174. Portions of H. B. 174 cross-refer to sections of H. B. 148 -- which sections are not “re-enacted” in H. B. 174. Hence, if H. B. 174 is implemented apart from H. B. 148, there will be no point of reference for these sections and they are left to dangle in legislative limbo, clearly an "absurd" result within the meaning of *Smedsrud* and like cases.[17] H.

[17] Section 53A-1a-806 as enacted in H. B. 174 requires the Board to establish rules for income verification since income level is one criterion for scholarship eligibility. In this regard, the Board is directed to compare an applicant's income with "maximum annual incomes listed in the income eligibility guideline as defined in Section 53A-1a-803" in order to set the amount of

B. 174 has no mechanism for enforcement outside of implementation that is integrated with H.B. 148. Two major goals which the Legislature sought to achieve through enactment of the voucher legislation, namely, governmental abstention in regulating the affairs of private schools and mitigation monies for public schools, will be frustrated in the event that H. B. 174 is implemented apart from H. B. 148. Given these core provisions which are writ large in H. B. 148 but absent from H. B. 174, it is improbable that the Legislature "intended" H. B. 174 to be implemented independently from H. B. 148. *See, e.g., Regal Ins. Co. v. Bott*, 31 P.3d 524, 526 (Utah 2001) (court's role is to give effect to legislative intent according to statute's plain language; statutory purpose is key to understanding that language); *Versluis v. Guaranty Nat. Companies*, 842 P.2d 865, 867 (Utah 1992) (same).

5. There is no funding for H. B. 174 unless it is read as part of H. B. 148. The circumstances under which H. B. 148 and H. B. 174 were passed confirm the textual analysis given above. Each bill provides for administrative appropriations, each in the amount of $100,000, one for fiscal year 2006-2007 and the other for fiscal year 2007-2008. The sponsor of H. B. 174 believed that the cost of administration for the voucher legislation would be $200,000 rather than $100,000, the amount provided in H. B. 148.

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scholarship funds that might be awarded. H. B. 148 enacts Section 53A-1a-803 with an "income eligibility guideline," but H. B. 174 does not. Section 53A-1a-806, as enacted in H. B. 174, therefore, has no point of reference without Section 53A-1a-803, as enacted in H. B. 148.

Likewise, Section 53A-1a-808, as enacted in H. B. 174, requires the Board to promulgate a rule that implements Section 53A-1a-807 respecting the calculation and allocation of "mitigation monies," but Section 53A-1a-807 is found only in H. B. 148 and is not found in H. B. 174.

Reflecting this belief, H. B. 174 amended the amount for administration-related appropriations to $200,000. Prior to passage of H. B. 174, however, this amount was modified downward to $100,000. This modification occurred because each bill, as noted above, in separate, uncodified sections, earmarks $100,000 for administrative costs, with H. B. 148 covering fiscal year 2006-2007 and H. B. 174 covering fiscal year 2007-2008. Hence, unless both bills are treated together, there will be a shortfall by $100,000 in the amount appropriated for costs of administration, a deficiency that would be contrary to the Legislature's intent when it enacted this legislation.18

S. B. 3, on the other hand, makes a scholarship fund appropriation only for H. B. 148. The appropriations bill, therefore, demonstrates that the Legislature believed that H. B. 174 would not be implemented outside of H. B. 148, since it funded only the latter and not the former.

The Attorney General recognizes the problem which S. B. 3 poses to a conclusion that H. B. 174 may be implemented apart from H. B. 148. He therefore tries to "read around" this problem in three ways, all of which are wrong or irrelevant.19

To begin, he says that a "credible" argument can be made that Item 135 of S. B. 3 provides funding for H. B. 174 because the funds appropriated therein are earmarked "to

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[18] The Attorney General's opinion, at 3, completely misses this point, observing instead that H. B. 174 "changed the appropriation of administrative monies to the State Board of Education from fiscal year 2006-07 to fiscal year 2007-08[.]" Moreover, after missing this point, and noting that the $100,000 is earmarked for administration of the scholarship program in "fiscal year 2007-08," rather than "fiscal year 2006-07," the Attorney General does not explain how administration of the program will be launched during the current budget cycle without any funds.

[19] Parr Waddoups does not discuss the issue of appropriations. As noted above, the Waddoups firm relies entirely upon a "repeal and replacement" argument. Parr Waddoups believes that H.

implement the provision of *Education Vouchers*[.]" This "argument," however, is far from credible; indeed, it borders on the disingenuous. S. B. 3 is crystal clear (in fact, it is crystal clear for a multitude of reasons) that the funding in S. B. 3 is for H. B. 148 and H. B. 148 alone.

First, there is the unmistakable, line-item reference to H. B. 148 and the conspicuous omission of any notation for H. B. 174. Second, S. B. 3 references "*Education Vouchers*" because this is the title of H. B. 148, in contradistinction to "*Education Voucher Amendments*" which is the title of H. B. 174. (The Attorney General's opinion italicizes *"Education Vouchers"* as though it were part of his argument -- without informing readers that this emphasis, in fact, is found in S. B. 3 and, most important, as found there, is a reference to the bill title of H. B. 148.) Third, the numbers given in S. B. 3 correlate with H. B. 148 and confirm the exclusion of H. B. 174. Fourth, the specific, line-item reference to H. B. 148 must be read in harmony with Utah Code Annotated, Section 63-38-3 which, according to subpart (b), constitutes a restriction or limitation upon the expenditure thus earmarked, and, under subparts (c), (d), and (f), may not be diverted, used, or transferred to any other entity, purpose, or item of appropriation.

Finally, even if S. B. 3's mention of "*Education Vouchers"* had been, as misleadingly implied by the Attorney General, a generic reference to the voucher program rather than, in point of fact, a specific reference to a bill title, he would have gained no ground in argument on this point. S. B. 3 earmarks the funds for "H. B. 148," and it is a cardinal rule of statutory construction that explicit language in a bill provision,

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B. 174 repealed and replaced H. B. 148, even though the same Legislature which effected this "repeal and replacement" expressly funded H. B. 148 in S. B. 3.

as distinct from terms that must be added by inference, will be enforced -- and specific terms always will trump and control any broader expressions in this regard. *See, e.g., Pugh v. Draper City*, 114 P.3d 546, 548-549 (Utah 2005); *Matter of Disconnection of Certain Territory*, 668 P.2d 544, 547-548 (Utah 1983); *Osuala v. Aetna Life & Cas.*, 608 P.2d 242, 243 (Utah 1980).20

The Attorney General next claims that he is "advised" by the Legislative Office of Legal Research and General Counsel that a fiscal analyst, Mr. J. Ball, has prepared a note which implies that S.B. 3's funding for H. B. 148 will cover H. B. 174 and that, therefore, "H. B. 174 needed no independent appropriation."

But this is not even close to what Mr. Ball states or implies in his note. The note from Mr. Ball is *premised* upon the fact that S. B. 3 appropriates money for H. B. 148 which already, at that juncture, had been passed by the Legislature and signed by the Governor. In view of *this fact*, Mr. Ball concludes that H. B. 174, if passed, will not require separate funding. The note also assumes that, as required in H. B. 174, both H. B. 174 and H. B. 148 will pass together and be coordinated (an assumption which, incidentally, the Attorney General and Parr Waddoups both refuse to make, since they both conclude that H. B. 174 repeals and replaces H. B. 148, defeating these conditions precedent of joint passage and mutual coordination). The note finally concludes that H.

[20] The Attorney General and Parr Waddoups, as noted above, opine that H. B. 174 repealed H. B. 148. This is an odd conclusion in view of the funding specifically provided for H. B. 148 in S. B. 3. Did the Utah Legislature truly intend to repeal a bill that was funded, by specific reference, in the same session? No one claims that the Utah Legislature is beyond error, but a 12,200,000 dollar mistake should not be inferred lightly. The Board should conclude that the Legislature meant what it said in S. B. 3 -- especially in view of the specific reference to H. B. 148 and the conspicuous omission of H. B. 174. Let others, like Messrs. Shurtleff and Waddoups, if they wish, show less deference to the legislative judgment in this regard.

B. 174, if passed in the absence of H. B. 148 and without any provision for coordination with that legislation, would have an "*estimated fiscal impact* of $9.4 million in FY 2008 and $12.5 million in FY 2009." (Emphasis supplied.) An estimation of fiscal impact surely is not the same as saying that a legislature's appropriation may be transferred from one bill to another. And even this "estimation" is based upon a hypothetical situation which (a) did not occur and (b), given H. B. 174's textual conditions of joint passage and mutual coordination with H. B. 148, could not occur -- absent enactment of an amendment to H. B. 174!

Whatever the meaning of Mr. Ball's "note," and even if the views of a single analyst on a hypothetical contingency may be considered, as claimed by the Attorney General, "a fair indication of legislative intent and understanding at the time," this will not override the plain text of the relevant statutes as shown above. *See, State v. Martinez,* 896 P.2d 38, 40 (Utah Ct. App. 1995) (opinion letter from Legislative Office of Legal Research and General Counsel, even if clearly directed to interpretive point at issue, does not control in face of plain meaning of statutory provision). *See also, Wilson v. Valley Mental Health,* 969 P.2d 416, 418 (Utah 1998) (where language of statute is plain, "legislative history" as interpretive tool becomes irrelevant).

The Attorney General finally engages in some impromptu brainstorming in order to accomplish *his* goal of using funds which S. B. 3 appropriates for H. B. 148 -- contrary to the terms of that appropriation and in order to implement H. B. 174. But this excursus is far afield from the statutory construction which ought to illuminate the relationship of H. B. 148 to H. B. 174 as intended in the Legislative Mind. It instead reflects a

capitulation to the obvious, that H. B. 174 never was meant to stand independently of H. B. 148.[21]

As noted above, where the language of statutes and the circumstances under which they were enacted are plain and unambiguous, a court will go no further in attempting to ascertain their meaning. The language of H. B. 148 and H. B. 174, the language of amendment, the reference to coordination, the conditional clause respecting joint passage, and so forth plainly indicate that the Legislature did not intend for one of

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[21] The Attorney General suggests that the Governor may invoke Utah Code Annotated, Section 63-38-3(e), to effect a transfer of funds appropriated under S. B. 3 from H. B. 148 to H. B. 174.

This assumes, of course, that the issue being addressed by the Attorney General, namely, whether H. B. 174 may exist independently of H. B. 148, can be answered affirmatively. It also assumes that Section 63-38-3(e) would allow such a transfer, an assumption that is doubtful since the statute speaks only of transfers "from one purpose or function to another purpose or function *within an item of appropriation,"* whereas S. B. 3 itemizes appropriations only for H. B. 148 and not for H. B. 174 and H. B. 148 and H. B. 174 do not appear to contain distinctive purposes or functions within the statute's contemplated application in any event.

But the suggestion is problematic on grounds which are additional to these flawed assumptions. The protocols for transfer that are stipulated in Section 63-38-3(e) will not mesh easily with the deadline (May 15) for the implementation of any rule under H. B. 174, if that bill truly, as the Attorney General believes, should be enforced irrespective of the status of H. B. 148. Any transfer pursuant to Section 63-38-3(e) must be initiated by a request from the department for which the monies were appropriated. In our case, this would be the Board. If the Board chose to make this request, the "the director of the Governor's Office of Planning and Budget shall require a new work program to be submitted for the fiscal year involved setting forth the purpose and necessity for such transfer." After this is done, the proposed change must be studied by the director and fiscal officer who then submit "findings and recommendations" to the governor who in turn determines whether the transfer should be permitted. This process of analysis, reporting, review, findings, recommendations, and decision surely will prolong the rulemaking effort beyond the statutory deadline of May 15.

Hence, the "brainstorm" of the Attorney General is demonstrably untrue, not only to the legislative intent, as we see it, respecting H. B. 148 and H. B. 174, but also in terms of his own preferred unilateral implementation of H. B. 174. The Legislature would not have included these incompatible timelines, one for rulemaking and the other for budgetary analysis, in the same bill. And if the Legislature intended to implement H. B. 174 regardless of H. B. 148, it would not have given the Board discretionary power to derail such implementation by deciding, as contemplated under Section 63-38-3(e), whether to "request" the budgetary transfers governed by that statute.

these measures to be implemented without the other. The circumstances of enactment, especially the plain language in the appropriations measures, points to the same result.

Accordingly, in light of the Utah precedents, cited above, there is no need to explore the legislative history, such as floor statements, respecting passage of these bills in order to plumb their meaning. We nevertheless have listened to the explanation given by Representative Last who sponsored H. B. 174, as well as the comments of other legislators who debated this bill. In our view, no fair-minded, reasonable person can interpret this explanation or regard these comments as anything other than explicit confirmation of the textual analysis given above. And anyone aware of the divisive conduct and bitter debate that led to passage of H. B. 148 by a margin of one vote in the House ever would believe that H. B. 174 could have passed the House and the Senate by super-majorities if it were regarded as a stand-alone piece of legislation or anything other than a minor improvement to an improvident bargain.

B. The Analogy to Repeal of H. B. 148

Argues for Non-Implementation of H. B. 174

The opinions from the Attorney General and Parr Waddoups focus less on textual analysis as a measure of legislative intent and more on a hypothetical repeal of H. B. 148 through referendum and what that would mean in terms of the separate enforceability of H. B. 174. By "repeal" here we do not mean any repeal of H. B. 148 that may have been effected by enactment of H. B. 174 as argued in the opinions of the Attorney General and Parr Waddoups and as discussed above. In this section of the memorandum, we mean any "repeal" of H. B. 148 that may be effected by the referendum effort or through a court decision which invalidates that statute on the ground that it is unconstitutional or

otherwise illegal. Taking a "repeal" of H. B. 148 in this sense as our premise, we demonstrate below that any such repeal would result in the invalidation of H. B. 174. Accordingly, since H. B. 148 and H. B. 174 will stand or fall together, one should not be implemented apart from the other.

What effect does a repeal of H. B. 148 have on H. B. 174? Or what would happen to H. B. 174 if a court made a ruling of unconstitutionality respecting H. B. 148?

There are two reasons, in our view, why a repeal of H. B. 148 would make H. B. 174 unenforceable. First, according to most authorities, as well as the controlling precedent in our state, if an original statute becomes invalid and unenforceable, through repeal or adjudication, amendments to that statute fall as well. These authorities will be discussed under this heading of our memorandum. Second, even if H. B. 174 were treated as a surviving portion of H. B. 148, under conventional rules of severability analysis, H. B. 174 would not stand alone or stay alive after the nullification of H. B. 148. This severability analysis will be given below in the following section of our memorandum.

A leading treatise on statutory construction holds that, “On the theory that provisions of the original act reenacted in an amendatory act are a continuation of the original act,[22] it is held that repeal of the original act repeals those provisions of the original act which were reenacted in the amendatory act. Provisions added by the amendatory act which are not complete within themselves, that is, those that must be read together with the reenacted provisions of the original act in order to be understood or

[22] In Utah, this “theory of continuation” is a statutory fact. *See*, Utah Code Annotated, Section 68-3-6.

enforced are also held repealed." 1A N. J. Singer, STATUTES AND STATUTORY CONSTRUCTION, Section 22:39, at 430 (6th ed. rev. 2002).

This rule is followed in many jurisdictions. Florida, for example, has held that, where a statute is repealed by implication, amendments to the impliedly repealed statute also are deemed repealed. *Oldham v. Rooks,* 361 So.2d 140, 143 (Fla. 1978), citing *Ex parte Neagle,* 224 P. 269, 272 (Mont. 1924) ("Life may not thus be breathed into a dead statute . . . an act amending a section of an act repealed is void"). Indiana follows the same rule where the original statute was repealed expressly rather than by implication. *Sutton v. State,* 101 N. E.2d 636, 638 (Ind. 1951). Washington also follows this rule on the theory that, "In the event of the subsequent repeal of the . . . original statute, the provisions of the first statute [which have been] continued in force in the second statute . . . fall with the abrogation of the original statute." *In re Assessment of Yakima Amusement Co.,* 73 P.2d 519, 521 (Wash. 1937), citing *Duke v. American Casualty Co.,* 226 P. 501, 504 (Wash. 1924). The *Duke* opinion (relying in turn upon an earlier Washington opinion, *State ex rel. McMillan v. Hills,* 186 P. 295, ___ (Wash. ____)) states this rule even more forcibly and in terms that address the "superseding" language of H. B. 174: "'While the decisions are not uniform, the rule respecting construction of amendments is that, where a section of an original act has been amended, the amendment superseding the original section, a subsequent statute amending the original section by number, but not amending the section as amended, supersedes and repeals the amendatory law.'" *Duke* and *Hills* rely upon citations to authorities from California, Idaho, Maine, Massachusetts,

and New York. The same rule is enforced in Missouri. *State v. Schenk,* 142 S. W. 263, 266 (Mo. 1911).23

The governing law in our state is in accord with the authorities cited above. In *In re J. P.*, 648 P.2d 1364 (Utah 1982), the Utah Supreme Court, writing through Justice Dallin Oaks, considered a constitutional challenge to the Children's Rights Act which was enacted as an amendment to Utah Code Annotated, Section 78-3a-48(1) in 1980. This legislation allowed for termination of a parent's relation to a biological child on a showing that such termination was in the child's "best interest" and without regard to the "fitness" of the parent.

While this constitutional challenge was pending, the Utah Legislature amended Section 78-3a-48(1) once again in 1981. The 1981 amendment left intact the "child's best interest" standard at the heart of the 1980 amendment and, therefore, even though the 1981 amendment added subsections in elaboration of this standard, the Court concluded that, in terms of constitutional analysis, the "1980 and 1981 [measures] stand on equal footing." *In re J. P.*, 648 P.2d. at 1370. *See also, id.* at 1369-1370 and nn. 3 & 4.

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[23] The Florida opinion discussed above, *Oldham v. Rooks,* as well as the Singer treatise, discuss an exception to this rule of statutory construction, namely, that "if the language intended to be inserted in a repealed statute, *when read alone,* has a clear and definite meaning, it will be treated as a valid and effective act." *Oldham v. Rooks,* 361 So.2d at 143 (emphasis in original). Proponents of the theory that H. B. 174 will survive notwithstanding any repeal by referendum of H. B. 148 may be tempted to seize upon this dictum, arguing that H. B. 174 has such a "clear and definite meaning" when "read alone," and, therefore, H. B. 174 will survive the invalidation of H. B. 148. But it is clear from *Oldham* and the authorities cited that the language which must have a "clear and definite meaning" when "read alone" in order to insure survival of the amendatory act is not the language of the original bill which is continued through re-enactment in the amendatory legislation, but rather the alterations to that language, the word changes between original bill and amendatory legislation. This is the "language intended to be inserted" which is referenced in *Oldham* and which is the language which must have independent definition in order to survive the invalidation of the original law. In our case, this would mean the few variations in the overall

After analysis on the merits, the Court declared the 1980 amendment unconstitutional pursuant to Article I, Sections 7 and 25, of the Utah Constitution and the Ninth and Fourteenth Amendments to the United States Constitution. *See, In re J. P.,* 648 P.2d at 1377.

The Court then considered the effect of this invalidation on the law as it had existed prior to the 1980 amendment, as well as on the 1981 amendment which had been enacted while the constitutional issues were argued on appeal. As to the former concern, the Court applied the standard rule that, upon invalidation of an amendment to a law, the pre-amendment law is revived in full force and effect. As to the latter issue, the Court cited Utah Code Annotated, Section 68-3-6, our statutory rule of construction that amendments are deemed to be continuations of old law rather than enactments or re-enactments of new law, and stated that, "The 1981 amendment does not remain in effect after this invalidation of the best interest standard enacted in the 1980 amendment. The 1981 amendment only added new criteria for determining the child's best interest; it did not enact or reenact the best interest standard itself, since that standard was already in force before that amendment was passed [referring to the 1980 law and referencing section 68-3-6]. *When the trunk is uprooted, the branch engrafted upon it must also fail." In re J. P.,* 648 P.2d at 1378 n. 14 (emphasis supplied).

The Parr Waddoups opinion, not only ignores the controlling precedent of *In re J. P.,* but also attempts to overrule it with an argument based upon a negative inference: "We also note that there is no provision anywhere in HB 174 that states that the bill will

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texts that are shared between H. B. 148 and H. B. 174. These changes, so few and diffused as "inserted" throughout H. B. 174, cannot be read together and will not stand alone.

not become law if HB 148 is repealed or challenged. Had the Legislature wanted to make HB 174 contingent on the outcome of a referendum challenge to HB 148, it could have done so. Similarly, had any individual legislator intended to allow HB 174 to be subject to a referendum, he or she could have voted no. Instead, both houses overwhelmingly passed HB 174 as a separate bill with the full text of provisions that superseded and replaced corresponding provisions in HB 148."

But this argument from negative inference misses the mark for the following reasons. First, the amendatory language to be enacted in H. B. 174 is expressly contingent upon passage together with the original legislation enacted in H. B. 148. Second, as noted above, *In re J. P.* employed an accepted canon of statutory construction -- that, where a bill is invalidated, amendments to that bill also fall -- in striking down the 1981 amendment to the Children's Rights Act. Other appellate precedent from the state of Utah holds that the Utah Legislature is deemed to know and apply these canons of statutory construction whenever, as a legislative body, it enacts a new law. *See, e.g., Ferro v. Utah Dept. of Commerce,* 828 P.2d 507, 510 (Utah Ct. App. 1992) (". . . we apply traditional rules of statutory construction under the assumption that the Legislature was operating under such rules"). The *Ferro* court, in this regard, relied upon *Morton Int'l, Inc. v. Auditing Div. State Tax Comm'n*, 814 P.2d 581, 589 (Utah 1991). Under this rationale, the Utah Legislature, when passing H. B. 148 and H. B. 174, was aware of the rule of construction adopted by *In re J. P.* and enacted both bills with the understanding that invalidation of H. B. 148 would result in the defeat of H. B. 174.

Indeed, the logical implication from *Ferro* and *Morton* is that the argument from negative inference works against Parr, Waddoups. In other words -- if the legislature,

knowing about and acting pursuant to the rule of *In re J. P.*, wanted to pass H. B. 174 so that it would remain standing after a repeal by referendum of H. B. 148, it would have so provided in those bills. The fact that such a provision is absent from the bills confirms that the Legislature intended to follow the rule announced in *In re J. P.* In light of the above, we conclude that, if the analogy to repeal is sound, then *In re J. P.*, as controlling precedent in this state, dictates that, if and when H. B. 148, as trunk, is uprooted, then H. B. 174, as the branch engrafted upon that trunk, also must fall.

C. Severability Analysis

In the event that, notwithstanding *In re J. P.*, the invalidation of H. B. 148 does not result in the failure of H. B. 174, a court would have to employ a severability analysis in order to determine whether H. B. 174 could survive when stripped of the coordinating features of H. B. 148. In our view, H. B. 174's odds for survival under such a severability analysis are nil and none.

Whether those portions of a statute which become invalid may be severed from the remainder, leaving that remainder to stand alone as an independent law, depends, once again, upon "legislative intent." Did the legislature "intend" that, in the event of partial invalidity, the remaining statute would be severed and survive for independent enforcement? *See, e.g., Union Trust v. Simmons,* 211 P.2d 190, 193 (Utah 1949) ("Severability . . . is primarily a question of legislative intent. The test fundamentally is whether the legislature would have passed the statute without the objectionable part, and whether or not the parts are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety").

Our answer to the question posed above is "no." In major part, the reasons for this answer are given in the beginning argument of this memorandum. We will not recapitulate all of that analysis here. But the textual evidence, the most illuminating and reliable for determining a legislature's intent, all points to the interdependence of H. B. 148 and H. B. 174. These two bills, one amending the other, were meant to be "coordinated." Even the "superseding" language in H. B. 174 becomes effective only on condition that H. B. 174 is jointly enacted with H. B. 148 ("If this H. B. 174 and H. B 148 . . . both pass"). This language (if both pass, then H. B. 174 amends H. B. 148) demonstrates that the Legislature saw both bills as mutually dependent within the rationale of *Union Trust* and other cases. As noted above, one can make a strong argument from this textual provision that, unless and until H. B. 148 "passes" by referendum, H. B. 174 has no life whatsoever or at best an inchoate existence which achieves birth only in that event. The appropriations language of S. B. 3 funds H. B. 148 and contains no reference to H. B. 174. This language reveals a legislative understanding that the two measures go together or not at all. And if the Board were to attempt an implementation of H. B. 174, apart from H. B. 148, given the express terms of S. B. 3, it would find no money to do so.

The Utah Supreme Court attempts to discern a legislature's "intent" for severability purposes, not only from textual clues, as noted above, but also by asking whether, in the event of severence, the statutory remainder, standing alone, adequately would fulfill those purposes that were central to the legislation when enacted. *See, e.g., Stewart v. Utah Public Service Com'n,* 885 P.2d 759, 779-780 (Utah 1994) (where intent is not expressly stated, "a court will infer the probable legislative intent from the

relationship of the unconstitutional provision to the remaining sections of the statute by determining whether the remaining sections, standing alone, will further the legislative purpose").

Our answer to the problem of purpose (insofar as that problem may have relevance in this case)24 also is "no." H. B. 148 was carefully crafted, through the statutory text as well as legislative compromise, to create a voucher program, to insure that this program would survive constitutional challenge, and to deflect or defer the impact of educational privatization upon the public schools. Two of these 3 purposes will die aborning if H. B. 174 survives the invalidation of H. B. 148. H. B. 174, unlike H. B. 148, does not proscribe USBOE interference with the internal affairs of private schools, most if not all of which will have religious affiliations. The Legislature could not have been unaware that voucher legislation always is challenged on establishment clause grounds. This feature of H. B. 148 was designed as a prophylactic for those church-state entanglements which might put the voucher program at greater risk or in harm's way in this regard. Even the Attorney General notes that, when this feature is severed, H. B. 174 has increased vulnerability under the First Amendment or parallel provisions in the Utah Constitution. H. B. 174, unlike H. B. 148, has no measure to soften the transition from "public" to "private" in our educational system. "Mitigation

[24] *Stewart* notes that the "purpose" aspect of severability analysis is a tool for inferring "the probable legislative intent," but that this tool may be used only where that intent "is not expressly stated" in the text of the statute. H. B. 174, however, contains language with an express bearing upon the question of severability. H. B. 174 states that it is to be coordinated with H. B. 148. It provides, moreover, that H. B. 174 shall become operative only if both H. B. 174 and H. B. 148 pass, and, upon fulfillment of that contingency, H. B. 174 shall amend H. B. 148. In view of these express indications of legislative intent, an examination of the purposes underlying the

monies," stopgap funds which would keep public schools on a budgetary par, notwithstanding an exodus of students to private institutions, are not authorized in H. B. 174. This important purpose, part of the legislative compromise that allowed passage of H. B. 148, would be defeated through the isolated implementation of H. B. 174.[25] In short, the "purpose" component of severability analysis weighs against the implementation of H. B. 174 apart from H. B. 148.

In certain cases, even after searching the textual clues and exploring the legislation's purposes, a court simply will "punt" on the question of legislative intent. Given the interrelationship between severed portions and surviving statute, courts often question whether they should hazard any guess at all respecting the kind of Humpty-Dumpty that the King, his horses and his men, would attempt to put back together again. In Utah, where two bills, such as H. B. 148 and H. B. 174, are so closely intertwined, in textual intentions and statutory purpose, our courts have been reluctant to substitute their judgment for what might have been or might become the legislative will in sorting and re-assembling the puzzle pieces in a new configuration. *See, e.g., Pride Company v. Salt Lake County*, 370 P.2d 355, 357 (Utah 1962).

Some statutes have "living wills," so-called "savings clauses," that tell the judiciary whether to pull the plug when the legislation is dismembered or close to death. Neither H. B. 148 nor H. B. 174 has such a provision (still another textual indication that

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statutes, as a means to infer the "probable legislative intent," may be irrelevant and hence unnecessary.

[25] Even the Attorney General's opinion grudgingly concedes that the voucher legislation never would have been passed without the provision for mitigation monies. Attorney General's Opinion at 4.

the legislature did not intend for surgical severance and partial survival to occur, *cf. Union Trust v. Simmons,* 211 P.2d at 193).26 But our courts will not enforce these clauses, even as expressions of legislative desire, where surgery is difficult or impossible. Thus, the Utah Supreme Court has held that, "Even where a savings clause existed, where the provisions of the statute are interrelated, it is not within the scope of this court's function to select the valid portions of the act and *conjecture* that they should stand independently of the portions which are invalid." *State v. Salt Lake City,* 445 P.2d 691, 696 (Utah 1968) (footnote omitted and emphasis supplied).

At bottom, this reluctance is obeisance to the constitutional standard of separate powers, an affirmation that, "'It is not the province of courts to substitute what they think ought to be the law for the ambiguous or indefinite terms of the legislature. Rather the courts should declare such an uncertain act invalid and leave to the legislature the task of clarifying the enactment.'" *Carter v. Beaver County Service Area No. One*, 399 P.2d 440, 441 (Utah 1965), quoting from *Nowers v. Oakden,* 169 P.2d 108, __ (Utah 1946).

As argued above, we do not believe that the legislative intent is impossible to ascertain on the question of severance relative to H. B. 148 and H. B. 174. This is because of the textual roadmap that the Legislature provided, showing that H. B. 148 and H. B. 174 were meant to be inseparable, and also because, insofar as the question of purpose may be relevant to this analysis, severance would defeat 2 of the 3 purposes which the Legislature deemed to be substantial in connection with these enactments. But

[26] Indeed, there is authority in Utah that where, as here, the statute or statutes in question do not have savings, or divisibility, or severability clauses, there is a presumption that the legislature intended the entire enactment to stand or fall as one piece. *See, e.g., Riggins v. District Court of Salt Lake County,* 51 P.2d 645, 652 (Utah 1935).

even if the text of these statutes were as impenetrable as an oracle from Delphi, the Board, like the Court in *State v. Salt Lake City*, should not have to *conjecture* on the proper fix for this legislative dilemma. The bills should be declared unenforceable in their present condition, leaving the primary responsibility for clarifying this situation to the Utah State Legislature. Let the House and Senate prune their own trees and take out their own trash.

D. There Is No Money for Administration;

There Are No Funds for Scholarships;

The Board Cannot Make Bricks Without Straw

S. B. 3 appropriates money for H. B. 148, but not for H. B. 174. The Board cannot write checks on an account with insufficient funds. Without money, the implementation of H. B. 174, with or without H. B. 148, is impossible.

As noted above, the Attorney General has suggested that the Governor (and by extension the Board) should jerry-rig appropriations in order to transfer funds earmarked for H. B. 148, using them instead for H. B. 174. This budgetary sleight-of-hand, if attempted, however, may require more than a little of that "lawlessness" which recently has been the subject of editorial disdain by the "chief law enforcement officer of the State of Utah." *See*, Mark Shurtleff, "The rule of law is not subject to whim or popularity," *The Salt Lake Tribune*, May 23, 2007.

First, it would defy the legislature's clearly expressed intent to fund one piece of legislation, H. B. 148, but not another, H. B. 174. Second, it would contravene the express terms of Section 63-38-3(e) which do not contemplate such a transfer of funds.

Third, it would subvert our law on referenda by using money that is earmarked for a bill which has been suspended by popular demand and statutory edict.

The Attorney General, in short, would have the Board bend or break three laws of unquestionable force in order to "obey" one law with, at best, uncertain validity. This -- notwithstanding his public admonition that, ". . . state school board members are not elected to make laws, or to substitute their own opinions or judgments for those of elected lawmakers . . ." Mark Shurtleff, "The rule of law is not subject to whim or popularity," *The Salt Lake Tribune,* May 23, 2007.

The Board should honor the Legislative Will, as that Will is clearly expressed in the plain language of S. B. 3 and H. B. 174. There is no money appropriated for H. B. 174. This is because the Legislature did not intend to fund and implement H. B. 174 apart from H. B. 148.

E. The Board Should Rule Against H. B. 174 on Prudential Grounds

The opinions of the Attorney General and Parr Waddoups deal with a hypothetical abstraction -- the ultimate invalidation of H. B. 148 and, from their standpoint, the stand-alone implementation of H. B. 174. The Board, on the other hand, must deal with reality -- and all of the contingencies of real life.

The Board is faced with a practical problem. Utah's statute on referenda has not invalidated H. B. 148; it merely postpones the effective date of that legislation, pending the outcome of an election to be held in the future. Hence, if the Board implements H. B. 174 before the validity of H. B. 148 is determined at the polls, the terms of that implementation may be undone after the fact in the event the referendum fails. Likewise, if the Board implements H. B. 174 before a judicial determination that H. B. 174 can be

enforced apart from H. B. 148, a subsequent ruling to the contrary may require reversal of those administrative steps which would have been taken in the meantime.

At bottom, if the Board wants to gamble on the outcome of these events (and on the "correctness" of the opinions from the Attorney General and Parr Waddoups) it will be betting with 12 million dollars of public monies (assuming that funds can be produced, as noted above, by prestidigitation). Once these funds are disbursed as scholarships -- they may not be recalled -- or recalled without difficulty and expense -- if the Board, in the event, ends up on the wrong side of this wager.

The Board has a stewardship, if not a fiduciary duty, in relation to these funds. The typical practice for stewards and fiduciaries, when funds under their control are the subject of dispute, is to hold those funds, pending the outcome of that dispute, in a safe place, an insured, interest-bearing account. The funds may not be spent in speculation on stocks and bonds that are traded on an exchange. Nor should they be staked, in our view, upon the hazard of an election or litigation.

Finally, while every agency must "construe" statutes before they are implemented and while "rulemaking" for agency purposes is merely an extension of "lawmaking" power that has been delegated by the legislative branch, there are prudential limits on the exercise of these functions. As noted above in the discussion of "severability," courts will invalidate a broken statute rather than re-build a statutory framework because they are chary about overstepping their bounds and intruding overmuch upon a legislative prerogative. This is a sign of respect for the legislature, trusting that it knows its own mind and business better than the court in question. This also honors the constitutional principle respecting the separation of powers. And it is not inconsistent with the

admonition of Mr. Shurtleff that, " . . . state school board members are not elected to make laws, or to substitute their own opinions or judgments for those of elected lawmakers, but rather to implement the laws made through our representative democratic process." Mark Shurtleff, "The rule of law is not subject to whim or popularity," *The Salt Lake Tribune,* May 23, 2007.

The Board, likewise, although powerful within its sphere, and, like other agencies, capable of acting in a quasi-judicial capacity, may be reluctant to re-join a pair of statutes that have been severed by circumstance. Indeed, if the Board determines that it should rebuild these statutes, one of the factors that must be considered in the event that H. B. 148 does not become law, is whether H. B. 174, standing alone, will pass constitutional muster. *See, e.g., State v. Lopes,* 980 P.2d 191, 196 (Utah 1999) (a close reading of statutory remainder is required to determine whether severance "will . . . make the objective of the statute unconstitutional"). If a court may "opt out" by "throwing up its hands" and "throwing in the towel," leaving "to the legislature the task of clarifying the enactment[,]" *Carter v. Beaver County Service Area No. One,* 399 P.2d at 441, surely the Board may show the same reluctance to arbitrate what amounts to a full-blown constitutional controversy. And returning to our theme of legislative intent, we seriously doubt that Utah's Legislature, when enacting H. B. 174, wanted the Board to preside and decide whether that measure, standing alone, would be constitutionally invalid. In the event, however, petitioner is prepared to file another request for agency action, setting forth those reasons why H. B. 174, as a stand-alone measure, is unconstitutional pursuant to the several provisions in the state constitution cited above, seeking a declaratory ruling that H. B. 174 should be invalidated upon those grounds.

IV. CONCLUSION

The Board should rule that H. B. 174 cannot be implemented apart from H. B. 148 for all of the reasons identified above. This authoritative clarification will be subject to judicial review pursuant to the provisions of the Utah Administrative Procedures Act. If judicial review is not sought, the Board's order will bring closure to the present crisis. If parties appeal the ruling of the Board, that appeal will be routed to the Utah Court of Appeals which, in all probability, immediately will certify the matter for decision by the Utah Supreme Court. This procedure promises to conclude, with finality, the thorny problem of H. B. 174 and to do so in the most expeditious manner presently available for all concerned. We strongly urge the Board to step forth with a firm resolve on this procedural path.

Dated this 25th day of May, 2007.

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